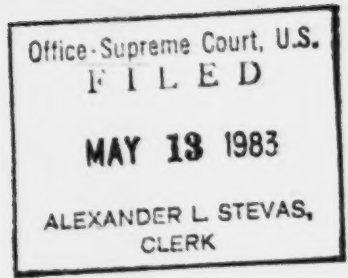


82-1846

No.



---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1982

---

RONALD W. ANDREWS, M.D.,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

---

Petition for Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit.

---

Richard M. Meltzer, Esquire  
MALIS, TOLSON & MALIS  
Suite 305  
Six Penn Center Plaza  
Philadelphia, PA 19103  
(215) 665-9111  
*Counsel for Petitioner*

## QUESTION PRESENTED

1. Was Petitioner deprived of his Fifth and Sixth Amendment Constitutional rights as a result of an indictment charging a physician with a violation of Title 21 United States Code §841(a)(1), but which indictment failed to include the essential allegation that the controlled substances distributed lacked a legitimate medical purpose or were distributed beyond the course of professional practice?

## INDEX

	Page
QUESTION PRESENTED .....	i
OPINIONS OF THE COURT BELOW .....	2
JURISDICTION .....	2
STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	3
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT .....	5

Certiorari is essential to prevent grave injustice to the Petitioner as Petitioner was deprived of his Fifth and Sixth Amendment rights under the United States Constitution as the decision of the Third Circuit Court of Appeals is contrary to the decisions of the Fifth Circuit Court of Appeals enunciated in *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981) and the Ninth Circuit Court of Appeals announced in *United States v. Deal*, 587 F.2d 956 (9th Cir. 1978) and is contrary to the policy of the United States Supreme Court as pronounced in *United States v. Moore*, 423 U.S. 122 (1975), which all provide that an essential element of the offense charging a physician with a violation of 21 U.S.C. 841(a)(1) is that the prescription was dispensed or distributed without a legitimate medical reason.

CONCLUSION .....	8
APPENDIX A — Statutes Involved .....	A-1
APPENDIX B — Final Judgment of Eastern District of Pennsylvania .....	A-2
APPENDIX C — Court of Appeals Judgment Order .....	A-4
APPENDIX D — Court of Appeals Petition for Rehearing En Banc .....	A-6

## TABLE OF CASES CITED

	Page
<i>United States v. Deal</i> , 587 F.2d 956 (9th Cir. 1978)	5, 7
<i>United States v. Moore</i> , 423 U.S. 122 (1975)	5, 6, 7
<i>United States v. Outler</i> , 659 F.2d 1306 (5th Cir. 1981)	5
<i>United States v. Roy</i> , 576 F.2d 386 (7th Cir. 1978)	7
<i>United States v. Seelig</i> , 622 F.2d 207 (6th Cir.), cert. denied 449 U.S. 869 (1980)	7

## STATUTES CITED

	Page
21 U.S.C. §841(a)(1)	i, 2, 3, 5, 6
28 U.S.C. §1254(1)	2

No.\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1982

---

RONALD W. ANDREWS, M.D.,  
*Petitioner*

v.

UNITED STATES OF AMERICA,  
*Respondent*

---

**PETITION FOR  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

To The Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:

Petitioner, Ronald W. Andrews, respectfully prays  
that a Writ of Certiorari issue to review the Judgment  
Order of the United States Court of Appeals for the Third  
Circuit, entered in the above case on March 14, 1983,  
affirming the Order of the United States District Court  
for the Eastern District of Pennsylvania in favor of Re-  
spondent, United States of America, and against Peti-  
tioner, Ronald W. Andrews.

### OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit entered a Judgment Order on March 14, 1983 affirming the Judgment of conviction and sentence of the United States District Court for the Eastern District of Pennsylvania of July 1, 1982. The United States Court of Appeals for the Third Circuit thereafter entered an Order denying Petitioner's Petition for Rehearing on April 7, 1983.

No specific reasons were given for either the decision of March 14, 1983 or April 7, 1983.

### JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit affirming the Judgment of the United States District Court for the Eastern District of Pennsylvania was entered on March 14, 1983 and is printed, *infra* (Appendix C, p.A-4). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on April 7, 1983 and is printed, *infra* (Appendix D, p. A-6). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

### STATUTES INVOLVED

The specific statutory provision involved is Title 21 United States Code §841(a)(1) and is printed, *infra*, Appendix A, p. A-1.

### STATEMENT OF THE CASE

On April 6, 1982, petitioner, Ronald W. Andrews, M.D., was indicted in the Eastern District of Pennsylvania in a 31 count superseding indictment charging him with violations of Title 21 United States Code, Section 841(a)(1).

Except for the dates, quantity, and description of the prescription for the controlled substance, each count contained the same allegation. A sample of a count in the indictment is contained below:

"That on or about August 14, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

RONALD W. ANDREWS

knowingly and intentionally did unlawfully dispense and distribute 50 tablets of Seconal, containing secobarbital, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

Title 21 U.S.C. §841(a)(1) provides, in part:

(a) "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally, (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense a controlled substance. . . ."

Following a jury trial on May 10, 1982, petitioner was convicted on 9 of the 31 counts and was sentenced to imprisonment for a term of three (3) years, a special parole term of two (2) years, and probation of three (3) years.

The Government's evidence was presented through the testimony of two (2) undercover agents and the Government's expert medical witness, Dr. George Woody. The two undercover agents presented evidence concerning their conversations with the petitioner in his medical

office including the medical treatment, history, and advice given by the petitioner.

In regard to the testimony of Dr. George Woody, the Government for the first time presented an offer of proof that it was necessary to prove that the conduct of the petitioner was outside the course of his professional practice. Dr. Woody then testified to procedures normally conducted in the usual course of a professional medical practice before prescribing drugs, reasons for prescribing certain drugs, and expressed an opinion as to the usual course of medical practice concerning the prescriptions with which the petitioner was charged with dispensing and distributing in violation of the law.

During his charge to the jury, the trial judge instructed the jury that an essential element of the offense was that the Government was required to prove the actions of the petitioner were outside the scope of his professional practice and that the prescriptions were distributed or dispensed other than for a legitimate medical purpose.

Following the petitioner's sentence, he timely filed an appeal to the Third Circuit Court of Appeals with new counsel, which appeal was denied on March 14, 1983. Petitioner filed a petition for rehearing which was denied on April 7, 1983.

The issue presented by this petition concerns whether petitioner's Constitutional rights were violated because the indictment failed to allege that the prescriptions were dispensed with a lack of a legitimate medical purpose, which is an essential element of the offense. Since there were no pre-trial motions filed to dismiss the indictment for lack of sufficiency, there is no evidence that either the petitioner or his original counsel would have been aware that the Government had to prove this essential element.

Petitioner was deprived of his Fifth and Sixth Amendment Constitutional rights as a result of an in-



dictment charging a physician with a violation of Title 21 United States Code §841(a)(1), but which indictment failed to include an essential allegation that the prescriptions dispensed or distributed lacked a legitimate medical purpose or were done so beyond the course of professional practice.

### REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

CERTIORARI IS ESSENTIAL TO PREVENT GRAVE INJUSTICE TO THE PETITIONER AS PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AS THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS ENUNCIATED IN *UNITED STATES v. OUTLER*, 659 F.2d 1306 (5th Cir. 1981) AND THE NINTH CIRCUIT COURT OF APPEALS ANNOUNCED IN *UNITED STATES v. DEAL*, 587 F.2d 956 (9th Cir. 1978) AND IS CONTRARY TO THE POLICY OF THE UNITED STATES SUPREME COURT AS PRONOUNCED IN *UNITED STATES v. MOORE*, 423 U.S. 122 (1975), WHICH ALL PROVIDE THAT AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGING A PHYSICIAN WITH A VIOLATION OF 21 U.S.C. 841(a)(1) IS THAT THE PRESCRIPTION WAS DISPENSED OR DISTRIBUTED WITHOUT A LEGITIMATE MEDICAL REASON.

In the case of the *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981), this same issue was raised before the Fifth Circuit Court of Appeals. In that case the defendant physician was indicted for the same violation as in this case and the issue presented was "whether a grand jury indictment which charges a physician with prescribing drugs in violation of 21 U.S.C., 841(a)(1)

must allege that the prescription lacked a legitimate medical reason? . . . For the following reason, we believe that the lack of a legitimate medical reason is an essential element of this offense and, therefore, must be alleged in the indictment." p. 1309

The Court states:

"This Court, however, repeatedly has held since *Moore* that it is incumbent upon the government to prove the lack of a legitimate medical reason in order to convict a registered physician of dispensing drugs in violation of 21 U.S.C. §841(a). [citations omitted] We now conclude that this element is essential to a charge of the offense. We recognize that an element is not always an 'essential element' simply because the prosecution carries the burden of proof; however, here the element embodies the culpability of the offense. Without behavior beyond professional practice, there is no crime. We believe, therefore, that the lack of a legitimate medical reason is as essential to the offense charged against Dr. Outler as the requisite *Mens rea*." (p.1310)

This decision was also premised upon the conclusion that the defendant's Fifth and Sixth Amendment rights were violated. The defendant's Fifth Amendment right guaranteeing the right to a proper grand jury indictment was violated since one could only speculate whether or not the grand jury was able to properly determine probable cause without this essential element. The Fifth Circuit did not believe that the defendant's Sixth Amendment rights were violated to the extent he had been unable to prepare a full defense to avoid surprise at trial, since his counsel had moved to dismiss the pertinent counts of the indictment for failure to contain this essential allegation. This distinction is critical since Petitioner never raised this motion and may not have been

aware of this essential element until trial. The Government should not be permitted to exploit its patently defective indictment by any contention of waiver.

The Ninth Circuit Court of Appeals also confronted this issue in *U.S. v. Deal*, 587 F.2d 956 (9th Cir. 1978). In that case, the indictment failed to charge an essential element of the offense i.e., lack of authorization to dispense. The court reversed the physician's conviction by holding that "lack of authorization to distribute or dispense controlled substances is an element of the crime. . . . The most liberal reading of the indictment does not reflect an allegation that Deal acted outside of the scope of the medical exception." p. 963.

These decisions are in apparent conflict with some other Circuits which have confronted this issue. In *U.S. v. Roy*, 576 F.2d 386 (7th Cir. 1978) the Seventh Circuit has ruled that the lack of a legitimate medical purpose is not an essential element of the offense stated in §841(a) (1). This decision appears to be no more than dicta. See also *U.S. v. Seelig*, 622 F.2d 207 (6th Cir.), cert. denied 449 U.S. 869 (1980).

It is essential that this issue be decided by this Court to obtain uniformity of indictments in all Circuits when a physician is charged with this offense. This Court should also consider the issue for clarification as to the application of its ruling in *U.S. v. Moore*, 423 U.S. 122 (1975) to the sufficiency of an indictment.

One should not be burdened with uncertainty of the essential elements of the offense to be presented against a defendant like petitioner, a professional practitioner. Speculation as to the adequacy of his preparation of a defense or to the initial decision of the grand jury in returning a defective indictment must not be permitted and countenanced. All future indictments must be uniform in charges of this nature and only this Court is able to demand such uniformity so that future defendants in a position as that of Petitioner herein can be adequately and fully protected in defending such charges.

## CONCLUSION

Petitioner's conviction resulted from an indictment which failed to contain an essential element of the offense. The element strikes at the core of the prosecution's case against the Petitioner, a physician charged with unlawfully dispensing or distributing controlled substances. The allegation that the physician's conduct occurred without a legitimate medical reason is required in some, but not all Circuits. Uniformity is essential to protect all similar defendants. Accordingly, Certiorari should be granted, and the conviction below reversed.

Respectfully submitted,

Richard M. Meltzer, Esquire  
Counsel for Petitioner

## **APPENDIX A**

### **Title 21 U.S.C. 841(a) (1). Prohibited acts A.**

#### **Unlawful acts**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . .

A-2

EASTERN DISTRICT OF PENNSYLVANIA

DEFENDANT

RONALD W. ANDREWS

APPENDIX B

DOCKET NO.

CR. 81-00353

## JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/79)

In the presence of the attorney for the government  
the defendant appeared in person on this date Terri Marinari, Esq.

MONTH	DAY	YEAR
June	30,	1982

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSELRichard M. Meltzer, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that  
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &  
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.Defendant has been convicted as charged of the offense(s) of Dispensing of controlled substances,  
in violation of Title 21, United States Code, Section 841(a)(1)SENTENCE  
OR  
PROBATION  
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS/ on Count 16.

In addition, there is a special parole term of TWO (2) YEARS imposed on Count 16. On Count 20, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS, said sentence shall run concurrently with sentence imposed on Count 16.

SPECIAL  
CONDITIONS  
OF  
PROBATION

On Count 21, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of imprisonment and upon termination of the special parole term.

On Count 22, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of

ADDITIONAL  
CONDITIONS  
OF  
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT  
RECOMMEN-  
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Donald W. VanArtsdalen

Date June 30, 1982

CERTIFIED AS A TRUE COPY ON

THIS DATE

July 1, 1982

Margaret L. McCaffrey

( ) CLERK

(X) DEPUTY



of imprisonment and upon termination of the special parole term, said sentence shall run concurrently with sentence imposed on Count 21.

On Count 23, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of imprisonment and upon termination of the special parole term, said sentence to run concurrently with sentence imposed on Count 21.

On Count 25, defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS, said sentence to run concurrently with sentence imposed on Count 16.

On Count 26, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with term of probation on Count 21; said term of probation to commence on the termination of any and all sentences of imprisonment and the term of any special parole.

On Count 27, defendant is committed to the custody of the Attorney General for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS to run concurrently with sentence on Count 16.

On Count 28, defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS to run concurrently with sentence on Count 16.

A-4

**APPENDIX C**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

No. 82-1407

---

**UNITED STATES OF AMERICA**

*v.*

**RONALD W. ANDREWS,**

*Appellant*

(Criminal No. 81-00353-01 - E.D.Pa.)

District Judge: Honorable Donald W. VanArtsdalen

---

Submitted Under Third Circuit Rule 12(6)  
March 9, 1983

BEFORE: SEITZ, *Chief Judge*, HIGGINBOTHAM and  
SLOVITER, *Circuit Judges*.

---

**JUDGMENT ORDER**

After consideration of the contention raised by appellant, to-wit, that an indictment charging a physician with prescribing drugs in violation of Title 21 U.S.C. §841(a)(1) is insufficient if it fails to allege the drugs were dispensed with a lack of legitimate medical purpose or outside the course of his professional practice, it is



A-5

ADJUDGED AND ORDERED that the judgment of  
the district court be and is hereby affirmed.

By the Court,

Chief Judge

ATTEST:

Chief Deputy Clerk

DATED: March 14, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 82-1407

---

UNITED STATES OF AMERICA

*v.*

RONALD W. ANDREWS,

*Appellant*

(Criminal No. 81-00353-01 - E.D.Pa.)

District Judge: Honorable Donald W. VanArtsdalen

---

**SUR PETITION FOR REHEARING**

PRESENT: SEITZ, *Chief Judge*, ADAMS, GIBBONS,  
HUNTER, WEIS, HIGGINBOTHAM,  
SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz  
Chief Judge

DATED: April 7, 1983

No. 82-1846

Supreme Court, U.S.  
FILED

JUL 25 1983

STEVEN L. STEVAS.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

RONALD W. ANDREWS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

REX E. LEE

*Solicitor General*

D. LOWELL JENSEN

*Assistant Attorney General*

CAROLYN L. GAINES

*Attorney*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

---

### QUESTION PRESENTED

Whether an indictment against a physician for unlawfully dispensing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1), must include an allegation that the conduct complained of was not in the usual course of a professional medical practice.

## TABLE OF CONTENTS

Opinion below .....	Page 1
Jurisdiction .....	1
Statement .....	1
Argument .....	4
Conclusion .....	7

## TABLE OF AUTHORITIES

### Cases:

<i>Hamling v. United States</i> , 418 U.S. 87 .....	7
<i>McKelvey v. United States</i> , 260 U.S. 353 ..	4
<i>United States v. Czeck</i> , 671 F.2d 1195 .....	6
<i>United States v. Jackson</i> , 576 F.2d 46 .....	5, 6
<i>United States v. King</i> , 587 F.2d 956 .....	5, 6
<i>United States v. Moore</i> , 423 U.S. 122 .....	4
<i>United States v. Outler</i> , 659 F.2d 1306 ....	5, 6
<i>United States v. Roy</i> , 574 F.2d 386 .....	5
<i>United States v. Seelig</i> , 622 F.2d 207 .....	5

### Constitution and statute:

U.S. Const. Amend. V .....	4
Controlled Substances Act, 21 U.S.C. (& Supp. V) 801 <i>et seq.</i> .....	4
21 U.S.C. 841 .....	4
21 U.S.C. 841(a)(1) .....	1, 4, 5
21 U.S.C. 885(a)(1) .....	4

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

No. 82-1846

Ronald

~~EDWARD~~ W. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The judgment order of the court of appeals (Pet. App. A4-A5) is not reported.

**JURISDICTION**

The judgment of the court of appeals was entered on March 14, 1983 (Pet. App. A5). A petition for rehearing was denied on April 7, 1983 (Pet. App. A6). The petition for a writ of certiorari was filed on May 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on nine counts of dispensing controlled substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of three years' imprisonment, to be followed by two years' special parole on five of the counts. Petitioner's sentence on the

other four counts was suspended and he was placed on three years' probation, to be served consecutively to the prison and special parole terms. The court of appeals affirmed (Pet. App. A4-A5).

1. The evidence at trial showed that in August 1980, Domenic Deodati, a state undercover narcotics agent, initiated an investigation into the activities of petitioner, a licensed physician, with respect to violations of state and federal drug laws. On August 14, 1980, Deodati went to petitioner's office and requested a prescription for quaalude (C.A. App. 81a).<sup>1</sup> Petitioner responded by telling Deodati that the DEA had warned petitioner that he was writing too many prescriptions for quaalude and suggested that he could give Deodati a prescription for seconal or dalmane to help him with any sleeping problems he might be experiencing (*ibid.*). Deodati agreed, and petitioner, without taking any medical history or performing any physical examination, gave Deodati a prescription for 50 seconal tablets and charged him \$15 (*id.* at 84a, 85a).

During the next six months Deodati visited petitioner a total of 10 times, obtaining more than two dozen prescriptions for seconal, desoxin, quaalude and tussionex.<sup>2</sup> Petitioner never examined Deodati or discussed any treatment of any medical condition; moreover, petitioner charged him by the number of prescriptions, *i.e.*, two prescriptions were charged as two office visits (C.A. App. 91a). On several occasions, petitioner made comments to Deodati indicating his awareness that Deodati was not personally using the prescriptions (C.A. App. 103a, 107a, 123a). Indeed, during a visit on

---

<sup>1</sup> "C.A. App." refers to the supplemental appendix filed by the United States in the court of appeals.

<sup>2</sup> Quaalude is a sedative hypnotic with the same effect as a barbiturate (C.A. App. 527a). Seconal is a barbiturate, desoxin is a stimulant, and tussionex is a cough syrup that contains a potent narcotic (*id.* at 519a-522a, 530a-532a, 533a).

November 6, 1980, Deodati requested a prescription for quaalude because it "sold better on the street," and petitioner issued the prescription (*id.* at 117a).

On November 10, 1980, a second agent, Esther Kiah, also visited petitioner and introduced herself as Deodati's friend (C.A. App. 385a). She asked for quaalude, which petitioner prescribed for her. He also gave her a prescription for dalmane, but told her to use different pharmacies for each prescription (*id.* at 388a). Petitioner charged Kiah \$25 for the "visit" (*id.* at 389a).

During the next four months, Kiah returned to petitioner's office three more times and obtained several prescriptions for quaalude, valium and dalmane (C.A. App. 391a, 393a, 403a, 413a-414a). Petitioner never discussed any form of treatment with regard to any of the drugs he prescribed for Kiah and never gave her a physical examination or even took a medical history of her (*id.* at 429a, 431a).

Petitioner was indicted on 31 counts charging that he "knowingly and intentionally did unlawfully dispense and distribute" specific drugs on specific dates (C.A. App. 7a-31a). Although there was no allegation in the indictment that petitioner was not acting in the ordinary course of his medical practice, petitioner never moved to dismiss the indictment on the basis of this omission. In the instructions to the jury, the district court explained that one of the elements the government was required to prove beyond a reasonable doubt was that petitioner acted "other than for a legitimate medical purpose and that he did so outside of the course of his professional practice, and not \* \* \* [to] provid[e] medication for a patient[']s welfare, needs or medical needs" (C.A. App. 753a).

2. The court of appeals affirmed (Pet. App. A4-A5). In so doing, it merely noted that petitioner challenged the adequacy of his indictment for failure "to allege the drugs were dispensed with a lack of legitimate medical



purpose or outside the course of his professional practice" (*id.* at A4).

### ARGUMENT

Petitioner argues (Pet. 5-8) that where, as here, the defendant in a prosecution under 21 U.S.C. 841(a)(1) is a physician, the "[absence] of a legitimate medical reason" is an element of the offense, and, accordingly, the failure to allege it in the indictment violates the Fifth Amendment due process right to be apprised of the specific crime charged and the right to be indicted by a grand jury. Petitioner's contention was properly rejected by the court of appeals.

It is settled that "an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey v. United States*, 260 U.S. 353, 357 (1922). With respect to the general provision of 21 U.S.C. 841, this Court observed in *United States v. Moore*, 423 U.S. 122, 131 (1975), that "[b]y its terms § 841 reaches 'any person.' It does not exempt (as it could have) 'all registrants' or 'all persons registered under this Act.'" Thus, any exceptions provided by the Controlled Substances Act, 21 U.S.C. (& Supp. V) 801 *et seq.*, must be raised on an individual basis by the defendant seeking its benefit and need not be alleged in the indictment.<sup>3</sup> Indeed, 21 U.S.C. 885(a)(1), explicitly states that "[i]t shall not be necessary for the United States to negative an ex-

---

<sup>3</sup> Of course, once a defendant has satisfied his burden of going forward with sufficient evidence to raise a factual issue as to whether an exception applies, the burden shifts to the government to prove the inapplicability of the exception beyond a reasonable doubt.

emption or exception set forth in this subchapter in any complaint, information [or] indictment \* \* \* and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." Accordingly, most courts have held that it is unnecessary to allege the absence of medical justification in an indictment charging a violation of 21 U.S.C. 841(a)(1). See Pet. App. A4-A5; *United States v. Seelig*, 622 F.2d 207, 211-212 (6th Cir. 1980); *United States v. Roy*, 574 F.2d 386 (7th Cir. 1978).

Petitioner points out (Pet. 6), however, that two other courts of appeals have decided that failure to allege the absence of any medical justification renders defective an indictment against a physician charging a violation of Section 841(a)(1). See *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981); *United States v. King*, 587 F.2d 956 (9th Cir. 1978). The inconsistency with the decision below does not, however, make this case a worthy candidate for review by this Court. First, there is at least some doubt whether the Fifth and Ninth Circuits would decide this case differently from the court below. In *King*, a divided court held, as an alternative ground, that the indictment was defective; the court also held that the conviction had to be reversed for failure to instruct the jury properly. 587 F.2d at 965-966. Thus, the court was not required to decide whether the deficiency in the indictment would, by itself, warrant reversal. Although the court in *Outler* did clearly hold that the deficiency in the indictment alone constituted reversible error, a different panel of that court, in *United States v. Jackson*, 576 F.2d 46, 48 n.4 (5th Cir. 1978), while leaving the issue open, noted that generally the government need not allege the absence of an exception and that medical justification is clearly an exception to Section 841(a)(1). While these considerations did not ultimately persuade the panel in *Outler*, their discussion in *Jackson* suggests that the final word in

that circuit on this issue may not yet have been written.<sup>4</sup>

Moreover, there is another crucial distinction between this case and *Outler* and *King*: petitioner never challenged the sufficiency of his indictment in the district court. Thus, he cannot raise the sufficiency of the indictment issue directly; his indictment, even if defective, should be upheld unless it was so defective that by no reasonable construction could it be said to charge the offense for which petitioner was convicted. *United States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). The allegation that petitioner did "unlawfully dispense" controlled substances adequately indicated that petitioner's conduct was for an illegal purpose. Thus, the indictment can reasonably be construed to charge petitioner with acting outside the scope of his medical authority. See *United States v. King*, 587 F.2d 956, 966 (9th Cir. 1978) (Choy, J., dissenting). There is no reason to suppose that a defendant who failed to raise this issue in a timely fashion would be able to secure a reversal of his conviction in either the Fifth or Ninth Circuit.

Finally, even if there is a conflict in the circuits on this issue, it plainly is not one that affects significantly the administration of criminal justice. The "defect" in the indictment does not impair any substantial rights of

---

<sup>4</sup> The court in *Jackson* upheld the conviction based on an indictment that did "not state that Dr. Jackson acted outside the scope of professional practice" (576 F.2d at 48); instead, it simply alleged that he unlawfully dispensed drugs "'under the guise and artifice of operating' his clinic," which the court held was sufficient.

Although there is a clear tension between *Outler* and *Jackson*, the United States did not seek rehearing en banc in *Outler* because the technical pleading requirement, even if unnecessary, did not involve an issue that was deemed important enough to justify en banc consideration, since the panel's decision did not impose any serious obstacle to law enforcement.

the defendant; it is a technical omission. This case is a good illustration of the point. Each count in petitioner's indictment clearly set forth the statutory elements of the offense, as well as the date of the offense, the quantity and description of the controlled substance, and a citation to the statute violated. Since the indictment contained the elements of the offense charged, it fairly informed petitioner of the charge against which he had to defend, and enabled him to plead his conviction in bar of future prosecutions for the same offense; accordingly, the indictment plainly satisfied due process. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Moreover, the allegation that petitioner "unlawfully" dispensed drugs, renders wholly fanciful petitioner's claim that the grand jury could have indicted under the misimpression that petitioner could be prosecuted under this statute simply as a physician writing prescriptions in the ordinary course of his practice.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

*Solicitor General*

D. LOWELL JENSEN

*Assistant Attorney General*

CAROLYN L. GAINES

*Attorney*

JULY 1983